PD-0552-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 11/1/2018 9:12 PM
Accepted 11/2/2018 9:53 AM
DEANA WILLIAMSON
CLERK

FILED
COURT OF CRIMINAL APPEALS
11/2/2018
DEANA WILLIAMSON, CLERK

No. PD-0552-18

In the Court of Criminal Appeals of Texas

Ex Parte Jordan Jones

Respondent / Appellant Jordan Jones's Brief on Petition for Discretionary Review

---

On Petition for Discretionary Review from the Twelfth Court of Appeals; Cause Number 12-17-00346-CR, reversing Cause Number 67295 from the County Court at Law Number Two of Smith County, Texas.

Bennett & Bennett, Lawyers
Mark W. Bennett
TBN 00792970
917 Franklin Street, Fourth Floor
Houston, Texas 77002
Tel. 713.224.1747
MB@IV13.com

Boren & Mims, PLLC
Mishae M. Boren
TBN 24097504
216 W. Erwin Street, Suite 300
Tyler, Texas 75702

Haygood Law Firm
Lane A. Haygood
TBN 24066670
522 North Grant Avenue
Odessa, Texas 79761

Counsel for Appellant
November 1, 2018

Table of Contents

Index of Authorities

CASES

STATUTES

OTHER AUTHORITIES

Request for Oral Argument

In its brief below, the State argued that strict scrutiny did not apply. But at oral argument, the State conceded that strict scrutiny applied.[1] In its brief, the State now again argues that strict scrutiny does not apply. It has not addressed why its position has changed.

This case is important because it will allow this Court to clarify just what it means for a restriction on speech to be "content based" and whether the State may avoid strict scrutiny for ideas it believes not to be of public concern. This is important not only to Mr. Jones, not only to those who are or might be charged under section 21.16(b) of the Texas Penal Code, and not only in Texas, but to the development of free-speech law nationwide.

Please allow oral argument.

Summary of the Argument

The court below reached the right result, but arguably for the wrong reason. Review is de novo.

---

[1] *Ex parte Jones*, No. 12-17-00346-CR, ___ S.W.3d ___, 2018 WL 1835925, at *5 (Tex. App.—Tyler April 18, 2018) ("Opinion Below").

The court below found that 21.16(b) did not survive the strict scrutiny analysis required by the United States Supreme Court for content-based restrictions on speech. The State of Texas, recognizing that section 21.16(b) cannot survive scrutiny, proposes a novel rule: courts may regulate traditionally protected speech if, on balance, its pernicious secondary effects outweigh its value to public discourse.

But "[f]rom 1791 to the present, the First Amendment has permitted restrictions upon the content of speech in a few limited areas[.]"[2] The United States Supreme Court has repeatedly held that strict scrutiny applies to penal laws that restrict private citizens' speech on the basis of its content.

The State asks this Court to disregard those traditional rules in favor of a "public concern" test. Whether the speech is on a matter of public concern has never been relevant to the scrutiny applied. The State attempts to inject ambiguity into this holding, but the Supreme Court has left no room for ambiguity.

Despite many opportunities, the Supreme Court has never, outside the context of regulations on sexually-oriented businesses, upheld a

---

[2] *United States v. Stevens*, 559 U.S. 460, 468 (2010) (internal edits omitted).

content-based restriction because it targets the "secondary effects" of the speech.

Nor can the State carve out exceptions for unpopular speech on the basis of its low value or pernicious effects.

The State properly conceded below that strict scrutiny applies. Under that scrutiny, 21.16(b) is fatally overbroad. Not every state interest may be vindicated with a content-based restriction on speech. The interests that may be so vindicated are delimited by the categories of historically unprotected speech. Preventing nonconsensual pornography is not one such interest.

Mr. Jones asks that this Court affirm the 12th Court of Appeals.

Argument

Introduction

This case involves a facial-overbreadth challenge to a penal statute. The United States Supreme Court has dealt with facial-overbreadth challenges to penal statutes several times this millennium and has shown this Court how to process such challenges. The Supreme Court's process is shown in Figure 1.

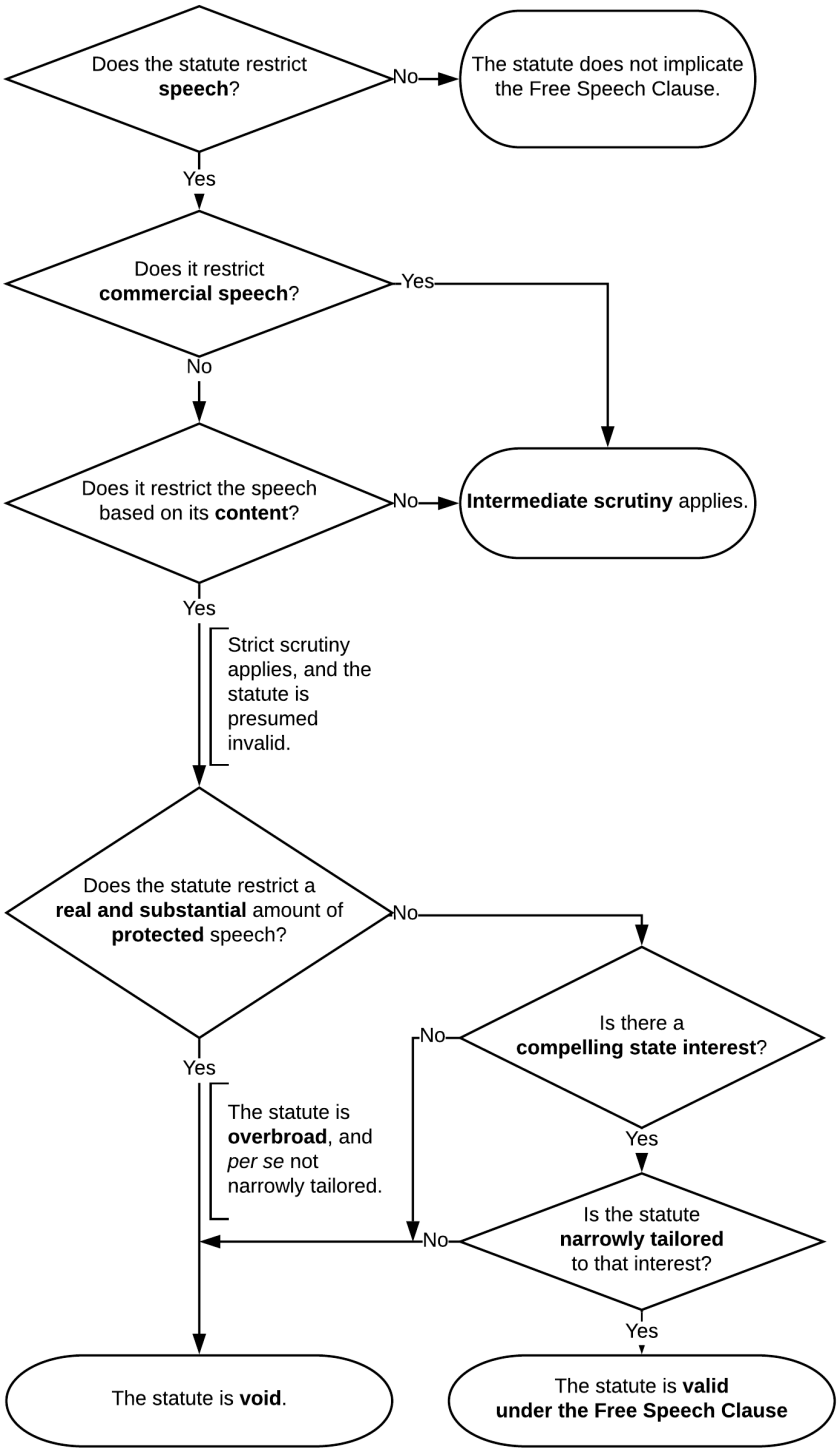

Does the statute restrict **speech**?
No
The statute does not implicate the Free Speech Clause.
Yes
Does it restrict **commercial speech**?
Yes
No
Does it restrict the speech based on its **content**?
No
Intermediate scrutiny applies.
Yes
Strict scrutiny applies, and the statute is presumed invalid.
Does the statute restrict a **real and substantial** amount of **protected** speech?
No
Is there a **compelling state interest**?
No
Yes
The statute is **overbroad**, and *per se* not narrowly tailored.
Is the statute **narrowly tailored** to that interest?
No
Yes
The statute is **void**.
The statute is **valid under the Free Speech Clause**

Figure 1

Section 21.16(b) is content based on its face.

Under both this Court's and the United States Supreme Court's binding authority, section 21.16(b) is content based on its face.

This court has announced a simple rule for content-based regulations:

> If it is necessary to look at the content of the speech in question to decide if the speaker violated the law, then the regulation is content based.[3]

The *Lo* rule follows from another principle of First Amendment Law:

Restrictions on speech are either content based or content neutral.[4] There is no third type of speech restriction: if a speech restriction is not content neutral it is content based.

Content-neutral restrictions, also known as "time, place, and manner" restrictions, must be, among other things, "justified without reference to the content of the regulated speech."[5]

---

[3] *Ex parte Lo*, 424 S.W.3d 10, 15 fn12 (Tex. Crim. App. 2013); *Ex parte Thompson*, 442 S.W.3d 325, 345 (Tex. Crim. App. 2014).

[4] *Ancheta v. Watada*, 135 F. Supp. 2d 1114, 1121 (D. Haw. 2001).

[5] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Because content-neutral restrictions must be justified *without* reference to the content of the speech, any restriction that is justified *with* reference to the speech's content—in other words, a restriction "under which it is necessary to look at the content of the speech to decide if the speaker violated the law"—is, by process of elimination, content based.

The United States Supreme Court agrees.

The United States Supreme Court has described such a test as "common sense":

> Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is "content based."[6]

Section 21.16(b) is content based for at least three reasons.

The Supreme Court most recently discussed what makes a restriction subject to strict scrutiny in *Reed v. Town of Gilbert, Ariz.*:

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. … Some facial distinctions based on a

[6] *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993).

> message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.[7]

Under *Reed*, section 21.16(b) faces strict scrutiny because it applies to particular speech because of its subject matter (here, intimate images) and its function (here, causing harm).

The United States Supreme Court's cases "use the term 'viewpoint' discrimination in a broad sense"; "Giving offense is a viewpoint."[8] The "harm" that can result in liability under section 21.16(b) is very broad: "anything reasonably regarded as loss, disadvantage, or injury."[9] Embarrassment (as alleged here) and social insult are commonly (and not unreasonably) considered "harm."[10]

---

[7] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015) (internal citations omitted, emphasis added). The Court did not impose a "public concern" condition on strict scrutiny, in *Reed* or anywhere else.

[8] *Matal v. Tam*, 137 S.Ct. 1744, 1763 (2017).

[9] Tex. Penal Code § 1.07(25).

[10] *See, e.g. Boyles v. Kerr*, 806 S.W.2d 255, 260 (Tex. App.—Texarkana 1991) (referring to "embarrassment or social insult" as "harm"), rev'd on other grounds, 855 S.W.2d 593 (Tex. 1993).

As *giving offense* is a viewpoint, so must causing other sorts of internal, social, emotional harms be a viewpoint. Because this law restricts speech that embarrasses or offends, but not speech that flatters or uplifts, it discriminates among points of view.

Section 21.16(b), like any content-based penal statute, faces strict scrutiny.

A government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[11] "As a result" of that limitation on state power, "the Constitution 'demands that content-based restrictions on speech be presumed invalid … and that the Government bear the burden of showing their constitutionality.' "[12]

Outside of some narrow contexts,[13] none of which apply here, content-based restrictions must satisfy strict scrutiny.[14]

---

[11] *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (emphasis added) (quoted approvingly in *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. at 2226; *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371 (2018); and pretty much every facial-overbreadth case since 1972).

[12] *United States v. Alvarez*, 567 U.S. 709, 715–17 (2012) (quoting *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 660 (2004)).

[13] Restrictions on commercial speech and regulation of sexually oriented businesses.

[14] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. at 2227.

The State's arguments for flimsier scrutiny fail.

The State's major argument, on which its brief depends, is that strict scrutiny does not apply because "the level of scrutiny depends on the value of the speech,"[15] and "revenge porn does not deserve strict scrutiny."[16]

The State's secondary argument is that strict scrutiny does not apply because "the statute satisfies the secondary[-]effects doctrine."[17]

Neither of these arguments is supported by the Supreme Court's facial-overbreadth caselaw.

The Supreme Court has repeatedly stated that a content-based restriction on speech must satisfy strict scrutiny.

The State argues that the application of strict scrutiny is reserved for regulations of speech on matters of public concern.[18] The Supreme Court's recent strict scrutiny cases demonstrate the falsity of that argument. "Public concern" is not a triggering factor for strict

---

[15] *State's Brief* 10.

[16] *Id.* 44.

[17] *Id.* 49.

[18] *State's Brief* 17.

scrutiny. The Supreme Court has repeatedly held that content-based restrictions must satisfy strict scrutiny,[19] and has never made "public concern" a requirement for the application of strict scrutiny.[20]

Consider, for example:

- *Reed v. Town of Gilbert*,[21] which did not hinge on whether the speech was on matters of public concern;

---

[19] *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. at 2371 (referring to "the rule that content-based regulations of speech are subject to strict scrutiny"); *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. at 2228 ("A law that is content based on its face is subject to strict scrutiny"); *McCullen v. Coakley*, 134 S.Ct. 2518, 2530 (2014) ("Justice SCALIA objects to our decision to consider whether the statute is content based and thus subject to strict scrutiny"); *United States v. Alvarez*, 567 U.S. 709, 715 (2012) ("When content-based speech regulation is in question, … exacting scrutiny is required); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) ("*O'Brien* does not provide the applicable standard for reviewing a content-based regulation of speech"); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009) ("content-based restrictions must satisfy strict scrutiny"); *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 677 (1994) ("benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications").

[20] Nor, contrary to the Vermont Supreme Court's unsupported assertion in *VanBuren*, has the United States Supreme Court ever recognized that speech concerning purely private matters "does not carry as much weight in the strict scrutiny analysis as speech concerning matters of public concern." *See State v. VanBuren*, ___ A.3d. ___, 2018 WL 4177776 (Vt. August 31, 2018).

[21] *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218.

- *United States v. Stevens*,[22] in which the speech (crush videos) was not of public concern;
- *United States v. Alvarez*,[23] in which the speech (stolen valor) was not only not of public concern but was by definition false, and thus of negative public concern;
- *Brown v. Entertainment Merchants Association*,[24] in which the speech was not of public concern;
- *United States v. Playboy Entmt Group, Inc.*,[25] in which the speech (sexually explicit video) was not of public concern;
- *NIFLA v. Becerra*,[26] in which the decision did not hinge on or even discuss whether the restricted speech was on matters of public concern;
- *Sorrell v. IMS Health*,[27] in which the speech ("prescriber-identifying information") was not of public concern;
- *Boos v. Barry*,[28] which did not hinge on whether the speech was on matters of public concern; and
- *Lorillard Tobacco v. Reilly*,[29] in which the speech (tobacco advertising) was of negative public concern.

---

[22] *United States v. Stevens*, 559 U.S. 460.

[23] *United States v. Alvarez*, 567 U.S. 709.

[24] *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786.

[25] *United States v. Playboy Entm't Group, Inc.*, 529 U.S. at 827.

[26] *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S.Ct. 2361.

[27] *Sorrell v. IMS Health Inc.*, 564 U.S. 552.

[28] *Boos v. Barry*, 485 U.S. 312 (1988).

The statute that the Court invalidated in *Brown* expressly covered only games that "lack serious literary, artistic, political, or scientific value for minors."[30] The statute that the Court invalidated in *Stevens* expressly did not restrict "any depiction 'that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.' "[31] Yet in these cases, as well in all other cases in which it struck penal statutes, the Court did not address whether the speech was on matters of public interest. As Justice Kennedy wrote in his dissent to the denial of certiorari in *Trans Union L.L.C. v. Federal Trade Com'n*:

> The plurality opinion in *Dun & Bradstreet* concluded that a false statement in a credit report was not speech on a matter of public concern, as that term is used in the context of defamation law. It is questionable, however, whether this precedent has any place in the context of truthful, nondefamatory speech.[32]

---

[29] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

[30] *Brown v. Entm't Merchants Ass'n*, 564 U.S. at 809.

[31] *United States v. Stevens*, 559 U.S. at 465.

[32] *Trans Union LLC v. Fed. Trade Com'n*, 536 U.S. 915 (2002) (Kennedy, J., dissenting from denial of certiorari). The D.C. Circuit's opinion is not binding on this Court.

In *Stevens*, the Court rejected an argument that serious value may be a general precondition to speech protection:

> Most of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation. Even "[w]holly neutral futilities … come under the protection of free speech as fully as do Keats' poems or Donne's sermons."[33]

Of religious, political, scientific, educational, journalistic, historical, or artistic value is not the same as "on matters of public concern"; it is broader—speech can be of artistic value even if it is not on matters of public concern. Yet even if this Court sees "nothing of any possible value to society" in nonconsensual pornography, restrictions on that speech must survive strict scrutiny.[34]

Snyder v. Phelps does not allow the State's interpretation.

The State, like the Vermont Supreme Court in *State v. VanBuren*, wants *Snyder v. Phelps* to stand for the proposition that speech that is

---

[33] *United States v. Stevens*, 559 U.S. at 479–80 (citations omitted).

[34] *Brown v. Entm't Merchants Ass'n*, 564 U.S. at 796 fn.4 (citation omitted, emphasis added).

not of public concern is less protected from regulation than speech that is of public concern.

The Supreme Court in *Snyder v. Phelps* did not, however leave this interpretation an option: "Our holding today is narrow. We are required in First Amendment cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us."[35] In light of this caveat, the fact that the Supreme Court "shield[ed] Westboro from tort liability for its picketing in this case" cannot be read to mean that some criminal defendant could be prosecuted for some entirely different speech.

Even the Vermont Supreme Court, while upholding that state's nonconsensual-pornography statute, refused to buy off on the argument that the State makes here:

> Because the Supreme Court has not expressly adopted an intermediate scrutiny framework for evaluating content-based restrictions that apply to low-value, purely private speech, we decline to do so here.[36]

---

[35] *Snyder v. Phelps*, 562 U.S. 443, 460 (2011).

[36] *State v. VanBuren*, 2016-253, 2018 WL 4177776, at *13 fn.9 (Vt. Aug. 31, 2018). The Vermont court went on:

As the United States Supreme Court has been reluctant, so should this Court be doubly "reluctant to mark off new categories of speech for diminished constitutional protection."[37]

THE PUBLIC CONCERN / PRIVATE CONCERN DISTINCTION ONLY MATTERS IN TWO CONTEXTS, NEITHER OF WHICH APPLIES HERE.

The United States Supreme Court has never applied the public concern / private concern distinction in an overbreadth challenge such as this one. It has never mentioned that distinction as significant in any case dealing with a penal statute restricting the speech of a private citizen. It has never mentioned that distinction as significant in any case requiring strict scrutiny.

The Court has considered the public concern / private concern distinction only in public-employment cases and tort cases.

> However, as a practical matter, in light of the Court's statements about the relatively lower constitutional value ascribed to such speech, application of strict scrutiny to restrictions on nonconsensual pornography may not look significantly different than an intermediate scrutiny analysis.

Strict scrutiny *is* significantly different than intermediate scrutiny, and when the Vermont court applied scrutiny that did not "look significantly different than intermediate scrutiny," it did not apply strict scrutiny. If the Vermont Supreme Court had properly applied strict scrutiny, the statute would not have survived.

[37] Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S.Ct. at 2372.

The Court has considered "public concern" in the context of public employment.

The Court has distinguished between speech whose content is a matter of public concern and speech on a purely private concern in public-employment contexts.[38]

In these cases, however, the Court has disclaimed the argument the State now makes:

> We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction.[39]

It has done so more than once:

> [A] governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public.[40]

---

[38] *See, for example, Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379 (2011).

[39] *Connick v. Myers*, 461 U.S. at 147.

[40] *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 80 (2004).

The Court has considered "public concern" in the context of speech torts.

The Court has also distinguished between speech whose content is a matter of public concern and speech on a purely private concern in cases involving tort liability.[41]

In none of these cases did the Court imply that it would be permissible, if the speech had touched merely on a matter of private concern, to subject the speakers to criminal liability; at most, speech on matters of purely private concern could expose the speaker to civil liability for defamation or other intentional torts.[42]

The State's proposed rule would turn privacy on its head.

Declaring that speech on matters of purely private concern is less protected would subject criminal restrictions on the sweet nothings we whisper to each other in private to lesser scrutiny. It would allow the state to criminalize non-obscene intimate communications—not a

---

[41] *See, e.g., Snyder v. Phelps*, 562 U.S. at 451-52 (intentional infliction of emotional distress); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (defamation); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (defamation);

[42] *See, e.g., Star-Telegram Inc. v. Doe*, 915 S.W.2d 471, 474 (Tex. 1995).

matter of public concern, per *San Diego v. Roe*—and only have to satisfy intermediate scrutiny.[43]

Bringing criminal First Amendment law in line with civil First Amendment law is not this Court's responsibility.

The Supreme Court's civil and criminal First Amendment rules do not match: a private plaintiff can use the power of the courts to punish speech that the government cannot criminalize; a government employer can fire an employee for what would be protected speech from a private citizen; there is no such thing as a substantial-overbreadth challenge in common-law tort case; strict scrutiny makes no sense in the context of most lawsuits between citizens because there is ordinarily no statute to be reviewed.

Whether the civil law should be brought in line with the criminal law, or the other way around, or neither, is not for this Court to decide. For this Court it should suffice to follow the rules that the Supreme Court has laid down and applied in directly analogous cases—cases in

[43] We know this not to be the law, because "sexual expression which is indecent but not obscene is protected by the First Amendment." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) (applying strict scrutiny).

which defendants challenged content-based penal statutes as substantially overbroad under the First Amendment.

Like the public concern / private concern distinction, the secondary-effects doctrine cannot save section 21.16(b).

The secondary-effects doctrine is a "doctrinal anomaly."[44] It applies only to regulations of sexually oriented businesses.[45] The Supreme Court has considered applying the secondary-effects doctrine to cases not involving adult establishments, and has rejected the idea.[46]

Under that doctrine, a facially content-based zoning restriction on sexually-oriented businesses may be justified as content neutral (and face only intermediate scrutiny) if it is aimed at the secondary effects of the speech.

---

[44] Leslie Gielow Jacobs, *Making Sense of Secondary Effects Analysis After Reed v. Town of Gilbert*, 57 Santa Clara L.R. 385, 390 (2017).

[45] *Id.* at 386.

[46] *Boos v. Barry*, 485 U.S. at 320–21, (plurality); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. at 430; *Reno v. Am. Civil Liberties Union*, 521 U.S. at 867.

The secondary-effects doctrine applies "to regulations that apply to a particular category of speech because the regulatory targets happen to be associated with that type of speech."[47]

The seminal secondary-effects case defined *secondary effects*:

> The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally protect and preserve the quality of the city's neighborhoods, commercial districts, and the quality of urban life, not to suppress the expression of unpopular views. As Justice POWELL observed in *American Mini Theatres*, "[i]f [the city] had been concerned with restricting the message purveyed by adult theaters, it would have tried to close them or restrict their number rather than circumscribe their choice as to location."[48]

The secondary-effects doctrine thus allows the state to circumscribe the location of sexually oriented businesses (the only context in which the Supreme Court has applied secondary-effects doctrine to uphold a restriction) but not to forbid them. "[A]n ordinance warrants intermediate scrutiny only if it is a time, place, and manner regulation and not a ban."[49]

---

[47] *Boos v. Barry*, 485 U.S. 312, 320 (1988).

[48] *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (internal quotation marks, edits, and citations omitted).

[49] *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 443 (2002).

The secondary-effects doctrine applies only if "the justifications for regulation have nothing to do with content."[50] Here the State's justification for regulation—"the harm that [having intimate images of oneself shared without one's consent] does to the depicted persons"[51]—cannot be said to have "have nothing to do with content." The harm results from the intimate nature of the content.

In *R.A.V. v. City of St. Paul, Minn.* the Court discussed secondary effects in the midst of a passage describing ways in which a court could constitutionally differentiate between certain subclasses of *proscribable* speech.[52] Outside the context of regulation of sexually oriented businesses, though, secondary effects do not affect the analysis applicable to restrictions on protected—unproscribable—speech.

In this case, the State is attempting to treat some lawful pornography differently than other lawful pornography because of its effect on its subject.

---

[50] *Boos v. Barry*, 485 U.S. at 320.

[51] *State's Brief* 7.

[52] *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 389 (1992).

The harm that speech might cause its subject is not a "secondary effect."

The State can point to no Supreme Court case describing the harm caused by speech to the person who is the subject of that speech as a "secondary effect." Harm caused to the subject of the speech by the intimate nature of its content is not analogous to the secondary effects described in *Renton*. People's reactions to speech are direct or primary effects, not secondary effects, of the speech.[53]

Just as "The emotive impact of speech on its audience is not a 'secondary effect,' "[54] the emotive impact of speech on its *subject* is not a secondary effect. It cannot be said that the effect of the speech forbidden here—harm, including embarrassment, to the subject—has nothing to do with the content. The embarrassment allegedly suffered by the complainant here has *everything* to do with the content of Mr. Jones's speech.

---

[53] *Contrast Texas v. Johnson*, 491 U.S. 397, 412 (1989) (the reaction of others to speech is a primary, not a secondary effect, of speech) with *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. at 47–52 ("secondary effects" include crime and deteriorating property values).

[54] *Boos v. Barry*, 485 U.S. 312, 321 (1988)

If "harm to the subject" were a secondary effect, then any deprecatory speech about another person could be forbidden, and a restriction on saying mean things about people would only have to face intermediate scrutiny.

The secondary-Effects Doctrine is called into doubt by the Supreme Court's holding in *Reed v. Town of Gilbert*.

With *Reed v. Town of Gilbert* the Court "shot a missile" into its own secondary-effects reasoning.[55] The secondary-effects doctrine says that content-neutral justifications can transform a facially content-based law regulating sexually oriented businesses into one that is content-neutral; *Reed* did not overrule the secondary-effects cases but did say that "an innocuous justification cannot transform a facially content-based law into one that is content neutral."[56]

Even if the secondary-effects doctrine survives, "*Reed* counsels against expanding its application beyond the only context to which the

---

[55] Leslie Gielow Jacobs, *Making Sense of Secondary Effects Analysis After Reed v. Town of Gilbert*, 57 Santa Clara L.R. at 388.

[56] *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. at 2228.

Supreme Court has ever applied it: regulations affecting physical purveyors of adult sexually explicit content."[57]

Conclusion: strict scrutiny Applies

Neither of the State's arguments for applying less-robust scrutiny is supported by the Supreme Court's jurisprudence. Strict scrutiny applies.

Section 21.16(b) is facially overbroad.

What is First Amendment overbreadth?

"The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."[58]

"Unprotected speech" here, is *speech within a recognized category of historically unprotected speech*. "Protected speech" is *speech not within a category of historically unprotected speech*.

---

[57] *Free Speech Coal., Inc. v. Attorney Gen. United States*, 825 F.3d 149, 161 (3d Cir. 2016) (discussing the evolution and history of the Supreme Court's secondary-effects jurisprudence).

[58] *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002).

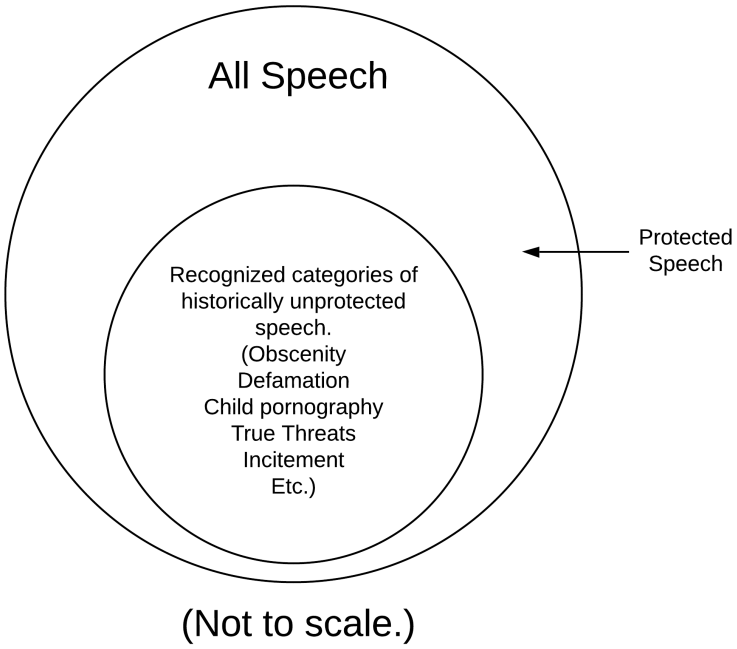


Figure 2

So, restating the rule:

The overbreadth doctrine prohibits the government from banning *speech within one of the recognized categories of historically unprotected speech* if a substantial amount of *speech not within one of the recognized categories of historically unprotected speech* is prohibited or chilled in the process.

These categories of historically unprotected speech, as recognized by the Supreme Court, include:

- Advocacy intended, and likely, to incite imminent lawless action;
- Obscenity;
- Defamation;

- Speech integral to criminal conduct;
- So-called "fighting words";
- Child pornography;
- Fraud;
- True threats; and
- Speech presenting some grave and imminent threat the government has the power to prevent, "although," says the Supreme Court, "a restriction under the last category is most difficult to sustain."[59]

The speech restricted by section 21.16(b) falls, by its terms, into none of these categories.[60]

A statute's overbreadth is speech restricted by section 21.16(b) but outside its legitimate sweep.

The substantial-overbreadth question is whether the statute reaches a real and substantial amount of constitutionally protected speech, judged in relation to the statute's plainly legitimate sweep.[61] A statute's *overbreadth*, then, is the reach of the statute, less its legitimate sweep. If that overbreadth is substantial, the statute is invalid.

---

[59] *United States v. Alvarez*, 567 U.S. at 717–18; *United States v. Stevens*, 558 U.S. at 468.

[60] The State in its brief disclaims a need to recognize an additional category of historically unprotected speech, and provides no evidence of such a category. *State's Brief* 48.

[61] *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003).

The legitimate sweep of a statute is limited to speech within an unprotected category.

The State wishes for section 21.16(b)'s "plainly legitimate sweep" to be the "justifiably restricted" speech of people who are not "'innocent' speakers" nor "lawful pornographers."[62]

Whether a restriction is "justifiable," and whether a speaker is "innocent" or "lawful," depends on whether the restriction is unconstitutional, so the constitutionality of a restriction cannot depend on whether it is "justifiable" or the speaker is "innocent" or "lawful." This would be a tautology.

"Legitimate" in this context does not mean *desirable*. The legitimate sweep of a statute is not its *politically correct* sweep. The legitimate sweep is not the *reprehensible* or *culpable* or *unlawful* or *low-value* or *harmful* or *embarrassing* or *deplorable* or *detestable* or *contemptible* speech restricted by the statute.

> The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find respondent's statements anything but contemptible, his right to make those

[62] *State's Brief* 75–77.

> statements is protected by the Constitution's guarantee of freedom of speech and expression."[63]

Instead *legitimate* means "constitutionally permissible." The substantial-overbreadth question is whether the statute reaches a real and substantial amount of constitutionally protected speech, judged in relation to the statute's plainly legitimate sweep.[64] The *legitimate sweep* of the statute comprises only *constitutionally unprotected speech*.[65]

The First Amendment permits restrictions upon the content of speech in a few limited categories, and does not permit this Court to disregard these traditional limitations."[66] The fact that speech in these categories is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality,"[67] is not a license for the state to

---

[63] *United States v. Alvarez*, 567 U.S. 709, 729–30 (2012).

[64] Virginia v. Hicks, 539 U.S. 113, 118–19 (2003)

[65] "The Court has made clear that facial challenges of this sort can succeed only if there is a significant imbalance between the protected speech the statute should not punish and the unprotected speech it legitimately reaches." *Shackelford v. Shirley*, 948 F.2d 935, 940 (5th Cir. 1991).

[66] *United States v. Stevens*, 559 U.S. at 468 (internal edits omitted).

[67] *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942).

restrict speech that the State considers of negligent social value outside of these categories.[68]

The State cannot justify restrictions on protected speech to suppress *unprotected speech*,[69] much less—as the State attempts here—to suppress the protected speech itself. The restriction of protected speech is *never* legitimate.[70]

The United States Supreme Court has expressly rejected a value-of-speech argument for unprotected speech:

> In light of the substantial and expansive threats to free expression posed by content-based restrictions, this Court has rejected as startling and dangerous a free-floating test for First Amendment coverage based on an ad hoc balancing of relative social costs and benefits. Instead, content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories [of expression] long familiar to the bar.[71]

---

[68] Or "categories," *see United States v. Stevens*, 559 U.S. at 468.

[69] *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002).

[70] Whether as-applied or as-written, the application of a content-based restriction to protected speech is impermissible.

[71] *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (internal edits and citations omitted).

The legitimate sweep of the statute is the speech that is restricted by the statute and that falls in those few historic and traditional categories of unprotected speech.

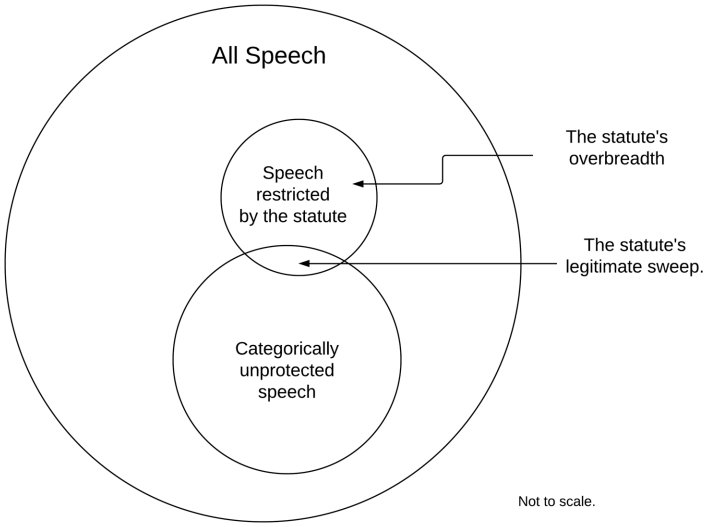


Figure 3

In the case of section 21.16(b), the legitimate sweep is the obscenity and child pornography that happen to be forbidden by the statute but are not targeted by it. Everything else forbidden by the statute falls into no recognized category of historically unprotected speech—it is, in the State's words, *lawful pornography*—and so is protected.

The burden is on the State.

"Content-based laws … may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[72] Yet the State claims, "If there is a case in which the government had to disprove overbreadth because the statute is content-based, the State cannot find it."[73]

The State need look no further than *United States v. Stevens*, in which the burden of rebutting the content-based statute's presumptive invalidity by providing "evidence" that "depictions of animal cruelty" was among "categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law"—in short, of disproving overbreadth—fell on the government.[74] In *United States v. Stevens*, as here, the government failed its burden, so the Supreme Court's judgment was simple: "substantially overbroad, and therefore invalid."[75]

---

[72] Reed v. Town of Gilbert, Ariz., 135 S.Ct. at 2226.

[73] *State's Brief* 74 fn.238.

[74] *United States v. Stevens*, 559 U.S. at 472.

[75] *United States v. Stevens*, 559 U.S. at 482.

United States v. Alvarez also demonstrates how the government must disprove the overbreadth of a content-based restriction: "Before exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with 'persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription[.]' "[76]

Per *Stevens* and *Alvarez*, content-based restrictions are normally prohibited; not only must the government disprove overbreadth, but it must do so in a specific way: by providing persuasive evidence that the speech falls into a category of historically unprotected speech.

Here the State has made no effort to provide the evidence required by *Stevens* and *Alvarez*.

Instead the State admits, "Most visual material [restricted by the statute] would be well within the realm of lawful pornography but for the fact that it was not intended or approved for disclosure by the person depicted; the consent requirement ensures that no lawful pornographers are chilled."[77] The fact that it is intimate and was not

---

[76] *United States v. Alvarez*, 567 U.S. at 722.

[77] *State's Brief* 77.

intended or approved for disclosure does not make speech fall into any recognized category of historically unprotected speech, and "lawful pornographers" begs the question—but for this statute and section 21.15 of the Texas Penal Code, which is subject to the same attack, the visual material restricted by section 21.16 *is* within the realm of lawful pornography.

The First Amendment provides a buffer zone, protecting even low-value speech to preserve high-value speech.

Section 21.16(b) strikes at the heart of the First Amendment, where lies "the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal."[78] This principle is not unlimited. Some speech falls into recognized categories of historically unprotected speech, and is therefore unprotected—but "[s]tatutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment."[79] "[T]he category of content-based regulation

---

[78] *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994).

[79] *United States v. Alvarez*, 567 U.S. 709, 715 (2012)

triggering strict scrutiny … exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints."[80]

The proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate,"[81] and "disgust is not a valid basis for restricting expression."[82]

Every substantial-overbreadth case involves speech that is at least arguably of low value: the government will never admit that it is seeking to criminalize high-value speech. So the Court has, in no uncertain terms, rejected an argument that speech protection depends on its value:

> The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.[83]

---

[80] *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. at 2238 (Kagan, J., dissenting).

[81] *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

[82] Brown, 564 U.S. at 798.

[83] *United States v. Stevens*, 559 U.S. at 470. *See also Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790 (2011) ("we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try"); *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000) ("moral judgments about art and literature … are for the individual to make, not for the Government to

The State's failure to disprove substantial overbreadth ends the inquiry.

> The showing that a law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep, **suffices** to invalidate all enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.[84]

If a statute were overbroad but not substantially so—restricting some protected speech, but not a substantial amount—those instances in which protected speech would be unconstitutional could be dealt with in as-applied challenges.[85] Here, though, because most of the visual

---

decree, even with the mandate or approval of a majority"); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 794 (1994) (Scalia, J., dissenting) ("The vice of content-based legislation—what renders it deserving of the high standard of strict scrutiny—is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters"); *Winters v. New York*, 333 U.S. 507, 510 fn.4 (1948) (even if we can see in communications "nothing of any possible value to society ..., they are as much entitled to the protection of free speech as the best of literature").

[84] *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (internal quotations and citations omitted, emphasis added).

[85] *See, e.g. Virginia v. Hicks*, 539 U.S. 113, 124 (applications violating the First Amendment can be remedied through as-applied litigation); *Broadrick v. Oklahoma*, 413 U.S. 601, 615–16 (1973) (when the overbreadth is not substantial, it should be

material restricted by the statute is, by the State's admission, within the realm of lawful pornography and not in any recognized category of historically unprotected speech, the statute is void.

EVEN IF IT WERE NOT FACIALLY OVERBROAD, SECTION 21.16(B) WOULD FAIL STRICT SCRUTINY.

Because a restriction cannot be simultaneously "substantially overbroad" and "narrowly tailored," this Court does not need to perform the rest of the traditional strict-scrutiny analysis.[86]

While a penal statute that is not substantially overbroad might fail strict scrutiny—because, for example:

- There is no compelling state interest; or
- The statute is underinclusive; or
- A civil remedy is a less restrictive means; or
- There is a "less speech-restrictive means by which the Government could likely vindicate its interest,"[87] or
- the state has a compelling interest in preventing gross harm but the statute punishes petty harm,

---

cured through case-by-case analysis); *New York v. Ferber*, 458 U.S. 747, 773–74 (1982) (same).

[86] *Cf. United States v. Stevens*, 559 U.S. at 482 ("substantially overbroad, and therefore invalid").

[87] United States v. Alvarez, 567 U.S. 709, 729 (2012).

—it is logically impossible for a penal statute that is substantially overbroad—that, like section 21.16(b), restricts a real and substantial amount of protected speech in relation to its legitimate sweep—to also be "narrowly tailored."

The fact that substantial overbreadth terminates the strict-scrutiny inquiry is reflected in *United States v. Stevens*'s epigrammatic "substantially overbroad, and therefore invalid."[88]

WILLIAMS-YULEE *DOES NOT MODIFY OR REJECT FACIAL-OVERBREADTH LAW.*

Williams-Yulee v. Florida Bar appears to say that a restriction can restrict a real and substantial amount of protected speech, and still pass strict scrutiny. But the portion of *Williams-Yulee* applying strict scrutiny to Canon 7C(1) of the Florida Code of Judicial Conduct[89]—Part II of the lead opinion—was not the voice of the Court, but only of four Justices. Justice Ginsburg did not join in the strict-scrutiny

---

[88] The question of whether that was "strict scrutiny" was raised in *Brown v. Entertainment Merchants Association*, in which Justice Scalia wrote, for the majority: "Justice ALITO … suggests … that Stevens did not apply strict scrutiny. If that is so (and we doubt it), it would make this an a fortiori case." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 793 fn.1 (2011).

[89] Not, it should be noted, a penal statute.

portion of the main opinion (she would have upheld the statute under lesser scrutiny), and Justices Scalia, Thomas, Kennedy, and Alito dissented.[90]

As Justice Kennedy wrote in dissent, "the Court's opinion contradicts settled First Amendment principles."[91] But *Williams-Yulee* is not an explicit modification or rejection of the rule in *Stevens*, *Alvarez*, and *Brown*. As Justice Scalia wrote in the primary dissent, the Court "purports to reach this destination by applying strict scrutiny, but it would be more accurate to say that it does so by applying the appearance of strict scrutiny."[92]

Williams-Yulee is a special case, a carving-out from the usual protection of the First Amendment of particular speech that judges view as bringing dishonor on their own kind:

> It is no great mystery what is going on here. The judges of this Court, like the judges of the Supreme Court of Florida who promulgated Canon 7C(1), evidently consider the preservation of public respect for the courts a policy objective of the highest order.

---

[90] *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656 (2015).

[91] Id. at 1682 (Kennedy, J., dissenting).

[92] Id. at 1677 (Scalia, J., dissenting).

> So it is—but so too are preventing animal torture [as in *United States v. Stevens*], protecting the innocence of children [as in *Brown v Entm't Merchants Ass'n*], and honoring valiant soldiers [as in *United States v. Alvarez*]. The Court did not relax the Constitution's guarantee of freedom of speech when legislatures pursued those goals; it should not relax the guarantee when the Supreme Court of Florida pursues this one. The First Amendment is not abridged for the benefit of the Brotherhood of the Robe.[93]

If further analysis beyond "substantially overbroad, and therefore invalid" were required, however, the statute would still fail because the State's asserted interests are not compelling, and because the statute is not narrowly tailored.[94]

---

[93] *Id.* at 1682 (Scalia, J., dissenting).

[94] In *State v. VanBuren* the appellant, mystifyingly, did not raise substantial overbreadth. "Although we focus our analysis on whether the statute has a 'plainly legitimate sweep,'" wrote the Vermont court, "our analysis does not ultimately turn on which standard of review we apply to this facial challenge." *State v. VanBuren*, 2016-253, 2018 WL 4177776, at *5 (Vt. Aug. 31, 2018). That court did not mention "plainly legitimate sweep" again.

Because the government cannot restrict protected speech for the sake of restricting unprotected speech, a statute's plainly legitimate sweep does not save it from overbreadth if the potential unconstitutional applications are real and substantial in relation to that sweep.

There are few compelling state interests that can be vindicated with content-based restrictions on speech, and this is not one of them.

Not every compelling state interest can be addressed by government restriction of free expression.

> There are all sorts of 'problems'—some of them surely more serious than this one—that cannot be addressed by governmental restriction of free expression: for example, the problem of encouraging anti-Semitism, the problem of spreading a political philosophy hostile to the Constitution, or the problem of encouraging disrespect for the Nation's flag.[95]

The State can point to no case (aside from *VanBuren*) in which a statute or regulation that restricted the speech of a private person based on its content was upheld because the speech was not of public concern.

The State can point to no case in which a statute or regulation that restricted the speech of a private person based on its content had to face anything less than strict scrutiny because the speech was not of public concern.

---

[95] *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 801 fn.8 (2011) (Scalia, J.) (internal citations omitted).

The State's asserted interests are not compelling.

The State says that the privacy of its citizens is a compelling interest. Today. But the State has not valued privacy so highly in the past, and likely will not do so in the future. In virtually every case in which the State argues about the people's privacy, the State opposes privacy interests.[96]

Specific to the claimed privacy interest here, against third-party disclosure of intimate information, this Court has held, at the State's behest, that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."[97]

---

[96] *See, for example, Long v. State*, 533 S.W.3d 511 (Tex. Crim. App. 2017) (State argues that reasonable expectation of privacy does not vitiate government eavesdropping); *State v. Rodriguez*, 521 S.W.3d 1 (Tex. Crim. App. 2017) (State argues that private search extinguishes legitimate expectation of privacy in dorm room); *State v. Granville*, 423 S.W.3d 399 (Tex. Crim. App. 2014) (State argues that student loses legitimate expectation of privacy in cell phone stored in jail property room); *State v. Huse*, 491 S.W.3d 833 (Tex. Crim. App. 2016) (State argues there is no reasonable expectation of privacy in hospital medical records); *Lawrence v. Texas*, 539 U.S. 558 (2003) (State argues that it may criminalize consensual sex between adults in privacy of home).

[97] *Ford v. State*, 477 S.W.3d 321, 329 (Tex. Crim. App. 2015).

The Texas Legislature has done nothing to mitigate the greatest threat to the people's privacy: State interference. The legislature that obdurately refused to remove a sodomy statute from the books for ten years after the Supreme Court held it unconstitutional cannot now credibly pretend to have an interest in the people's privacy.

The State that consistently argues against the privacy rights of the people in relation to the State itself cannot credibly claim to be a champion of privacy. The State's claimed interest in "preventing the harm that results from these invasions of privacy,"[98] or in "privacy,"[99] is nothing more than a stalking horse for the criminalization of protected speech.[100]

---

[98] *State's Brief* 3.

[99] *State's Brief* 52

[100] While the First Amendment imposes no freestanding "underinclusiveness limitation," a law's underinclusiveness "raises a red flag." *Williams-Yulee v. Florida Bar*, 135 S.Ct. at 1668. *See also Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. at 2232 (citation omitted) ("a law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited").

Preventing harm, including invasions of privacy, is not a compelling state interest.

Some speech causes harm. Not all harmful speech is unprotected. True threats, and fraud, and defamation, are categories of speech that are unprotected in part because of the harm they cause, but speech causing harm is not generally a category of unprotected speech.

Mr. Jones is accused of embarrassing the complainant; embarrassment is a part of life from which the State has no compelling interest in protecting citizens.

In *Scott v. State* this Court applied "intolerable invasion of privacy" dictum from *Cohen v. California* in upholding Texas's telephone-harassment statute.[101] Then in *Thompson* this Court in dicta suggested that *Cohen*'s dictum might justify a properly drawn improper-photography statute.[102]

---

[101] *Scott v. State*, 322 S.W.3d 662, 669 (Tex. Crim. App. 2010), *abrogated by Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2014). The full sentence from *Cohen* is, "The ability of government, consonant with the Constitution, *to shut off discourse solely to protect others from hearing it* is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California*, 403 U.S. 15, 21 (1971) (emphasis added). The emphasized portion of that sentence did not find its way into this Court's *Scott* opinion.

[102] *Ex parte Thompson*, 442 S.W.3d at 348.

As the State correctly notes, *Cohen*'s "intolerable invasion" privacy language belongs to the Supreme Court's captive-audience cases, protecting the privacy of the listener rather than that of the subject of the speech.[103] *Scott* is about protecting a captive audience from intrusions; *Thompson* is about protecting the subjects of speech. The Supreme Court has discussed the difference between the two motivations: during the same term as *Cohen* the Court, in rejecting the contention that a court could enjoin speech invading its subject's privacy, wrote, "Among other important distinctions, respondent is not attempting to stop the flow of information into his own household, but to the public."[104]

Section 21.16(b) is not intended to shut off discourse to protect others from hearing it. It is intended to shut off discourse to protect its subject. The Supreme Court has never suggested that speech may be criminalized to protect its subject from even an essentially intolerable

---

[103] The United States Supreme Court has never found that speech is unprotected because it invades substantial privacy interests in an essentially intolerable manner. The *Scott* Court's elevation of the *Cohen* dicta to binding law is a quirk of Texas law that does not harmonize with the decisions of the United States Supreme Court.

[104] *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971).

invasion of privacy; this Court should disclaim that dictum from *Thompson*, and restrict *Cohen*'s dictum to its proper context.

THIS CASE IS NOT ABOUT COMPELLED SPEECH.

The State also claims a compelling interest in protecting "the freedom not to speak"[105] … then immediately confesses that the complainant in a 21.16(b) case is not compelled to speak, but instead "is the speech."[106] This is novel, but not accurate. The subject of speech is not the speech; photography does not steal one's soul.

While the First Amendment protects one from being compelled to speak, and from being defamed, it does not protect one from being truthfully depicted. The Supreme Court has "repeated[ly] refus[ed] to answer categorically whether truthful publication may ever be punished consistent with the First Amendment" because "the future may bring scenarios which prudence counsels our not resolving anticipatorily."[107]

---

[105] *State's Brief* 52.

[106] *Id.*

[107] *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) (internal quotation omitted). The fact that "future scenarios" concern the Supreme Court is telling: If the answer were "yes, truthful publication may *sometimes* be punished consistent with the First

The statute is not the least-restrictive means of achieving any compelling state interest.

Even if the State could identify an interest of the highest order, the approach it has taken with section 21.16(b) is not the least-restrictive means of achieving it.

A civil remedy is a less-restrictive means.

As the dissent would have found in *VanBuren*, civil enforcement is a less-restrictive alternative to criminal prosecution for vindicating any state interest that might exist.[108]

Because that less-restrictive means exists, section 21.16(b) fails the narrowness prong of strict scrutiny.

Making offensiveness and private concern fact issues would be a less-restrictive means.

Texas recognizes the tort of intrusion on seclusion. This tort has elements that section 21.16(b) does not require: that there be

---

Amendment," the Court's options in future scenarios would not be limited; only if the answer were "no" would it limit the Court's options in future scenarios.

[108] *State v. VanBuren* at *20 (Skoglund, J., dissenting).

intentional *physical intrusion or a wiretap*,[109] and that it be *highly offensive to a reasonable person*.[110]

Texas also recognizes the tort of public disclosure of embarrassing private facts, which also has elements that section 21.16(b) does not require: publicity given to matters of his private life that *would be highly offensive to a reasonable person of ordinary sensibilities*, and *is not of legitimate public concern*.[111]

The highlighted phrases in the preceding two paragraphs are elements; they are not presumed. In civil cases, to recover money from a defendant, a plaintiff must prove them. They are for a jury to decide.

Section 21.16(b) does not contain these elements. The State will argue, *well of course publication of a picture of a buttock or a nipple would*

---

[109] *See Soda v. Caney*, No. 05–10–00628–CV, 2012 WL 1996923, at *2–3 (Tex. App.–Dallas June 5, 2012, pet. filed) ("[Appellant] cites no authority, nor have we found any, where a Texas court concluded a party suffered an intrusion upon his seclusion absent evidence of a physical invasion or eavesdropping. On the contrary, other courts concluded evidence of a physical invasion or eavesdropping was necessary to sustain a claim for intrusion upon seclusion.")

[110] *See Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993).

[111] *Indus. Found. of the S. v. Texas Indus. Acc. Bd.*, 540 S.W.2d 668, 682 (Tex. 1976).

be highly offensive to a reasonable person of ordinary sensibilities; of course it is not of public concern. But those things are not necessarily true. A jury might look at a picture and decide that its publication was not inherently offensive, or that it was of public concern. Section 21.16(b) requires only subjective harm (including embarrassment); it does not require that the complainant take high offense, much less that the publication be objectively highly offensive.

"Elements" are not things the State can decree. Elements are questions for the finder of fact. And if these elements are necessary to impose civil liability, surely they are necessary to impose harsher criminal liability. By analogy to the tort of publication of private facts,[112] the criminalization of nonconsensual pornography ought at least to leave for the jury the questions of whether the publication would be highly offensive to a reasonable person of ordinary sensibilities, and whether the publication is of public concern.[113]

---

[112] The United States Supreme Court has never held that the tort of publication of private facts passes First Amendment scrutiny.

[113] *Cf. Miller v. California*, 413 U.S. 15, 24 (1973) (requiring that trier of fact decide the questions that determine whether speech is obscene). In discussions of obscenity and the Miller test, it is often lost that the test contains "basic guidelines for the trier of fact." *Id.*

Punishing only intentional serious harm would be a less-restrictive means.

While Mr. Jones does not concede that the State could write any statute forbidding nonconsensual pornography that was not facially overbroad, the Vermont statute upheld in *VanBuren* and the California statute upheld by a low-level appellate court in *People v. Iniguez* are examples of *more*-narrowly drawn restrictions aimed at the same alleged state interests.

The Vermont statute includes as elements:

- Physical injury, financial injury, or serious emotional distress;
- Intent to harm, harass, intimidate, threaten, or coerce; and
- That "the disclosure would cause a reasonable person to suffer harm.[114]

The California statute includes as elements that:

- "The person distributing the image know[] or should know that distribution of the image will cause serious emotional distress"; and
- "The person depicted suffer[] that distress."[115]

---

[114] Vt. Stat. Ann. tit. 13, § 2606.

[115] *People v. Iniguez*, 247 Cal. App. 4th Supp. 1, 6 fn.4 (Cal. App. Dep't Super. Ct. 2016).

Section 21.16(b), by contrast to these two statutes, is designed to protect even unreasonably fragile sensibilities from minor emotional distress that a defendant had no reason to expect, much less intent to cause.

Because, as California and Vermont illustrate, section 21.16(b) is not the least restrictive means of achieving the state's putative interest, it fails strict scrutiny.[116]

Basing liability on only the defendant's actions would be a less-restrictive means.

Under section 21.16(b) the act of disclosure need not identify the person in the image. If someone else comes along later, without the discloser's consent or even knowledge, and says, "that is A," the discloser can be prosecuted for the disclosure, despite the identification not having been done by him and not being under his control.[117]

---

[116] *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 827 (2000) (statute must be least-restrictive means to pass strict scrutiny).

[117] Tex. Code Crim. Proc. § 21.16(b).

A narrowly tailored statute would, at a bare minimum, impose liability based only on the defendant's actions. Because section 21.16(b) allows someone else to convert a defendant's non-criminal act to a felony after the fact, it fails the narrow-tailoring prong of strict scrutiny.

Conclusion: The State proposes two dangerous rules.

> The fundamental freedom of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.[118]

"[T]he power to declare facts or topics to be off limits to public discussion is in a very real sense the power to censor."[119] If this Court were to declare some topics *not of public concern* and therefore subject only to intermediate scrutiny, it would be censoring speech in a way that the First Amendment has not heretofore allowed. "If the

---

[118] *Roth v. United States*, 354 U.S. 476, 488 (1957).

[119] Richards, Neil M., *The Limits of Tort Privacy*, 9 J. on Telecomm. & High Tech. L. 357, 379 (2011).

marketplace of ideas is to remain free and open, governments must not be allowed to choose which issues are worth discussing or debating."[120]

If speech's effect on its subject were a *secondary effect* that subjected a restriction to intermediate scrutiny, almost any speech restriction would face only that reduced level of scrutiny. Finding secondary effects for unwanted speech is so simple that even a Texas legislator could do it.

Under the State's reasoning, the State could criminalize:

- Crush videos (not matters of public concern! harmful secondary effects of normalizing animal abuse!);
- Stolen valor (lies—not matters of public concern! harmful secondary effect of devaluing military decorations!);
- Other lies (not matters of public concern! harmful secondary effect of deceiving people!);
- Flag-burning (harmful secondary effect of diminishing the state's power!);
- Hate speech (harmful secondary effects of demeaning a group and hurting people's feelings!);
- Defamation of Texas legislators (harmful secondary effects of diminishing respect for the state and hurting legislators' feelings!);
- Dirty talk to minors (not a matter of public concern! harmful secondary effect of facilitating child sex abuse!); and

---

[120] *Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 537–38 (1980).

- Improper photography (not a matter of public concern! harmful secondary effect of sexualizing people without their consent!).

These restrictions, if this Court were to adopt the State's two novel modifications to free-speech jurisprudence, would only face the almost-never-fatal intermediate scrutiny, rather than the almost-invariably fatal strict scrutiny.

This would not be "cracking" the 227-year-old ironbound oaken door barring state intrusion into freedom of speech, but taking it off its hinges and replacing it with a rusted-through screen door.

Prayer

For those reasons, please affirm the judgment of the Twelfth Court of Appeals.

Certificate of Service

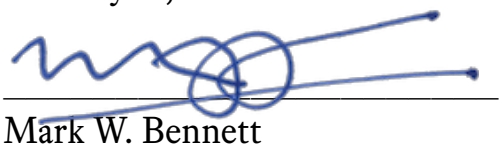
A copy of this brief was delivered by the efiling system to the attorney for the State before it was filed with this Court

Certificate of Compliance

According to Microsoft Word's word count, this brief contains 9,607 words, not including the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented,

statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix

Thank you,



Mark W. Bennett
SBN 00792970
Bennett & Bennett
917 Franklin Street, Fourth Floor
Houston, Texas 77002
713.224.1747
mb@ivi3.com
Lead Counsel for Mr. Jones